of Appeal in *Re Macadam* [1] and in view of my own decision in the local case of *Wilkins* v. *Wilkins* [2] which followed the earlier case of *Butler-Madden* v. *Krishnasamy* [3] and which has been accepted by the profession for the last thirteen years we are of the opinion that the present application is to be decided in the light of what was said in *Re Coles and Ravenshear* [4] and not in the light of what was said in *Catti* v. *Shoosmith.* [5]

From that it follows that the application must be dismissed with costs.

Application dismissed.

CALTEX OIL (MALAYA) LTD. v. HO LAI YOKE & ANOR.

[O.C.J. (Ong J.) January 7, 1964]
[K.L. — Civil Suit No. 792 of 1963]

Contract—Sale of Land—Repudiation by vendor—Specific performance—Contracts (Malay States) Ordinance, 1950, s. 52—Specific Relief (Malay States) Ordinance, 1950, ss. 13, 15.

By an agreement dated March 26, 1961, the vendors YFC and HHC granted to the plaintiffs an option to purchase a parcel of land made up of Lot Nos. 145, 3 and 165. Lot 3 was State land which had been approved by the Collector of Land Revenue to the vendors. Lot 165 was acquired on October 12, 1961. The plaintiffs received the option on September 22, 1961 and requested the vendors to deliver documents of title and registrable transfers in exchange for a cheque for $33,500 which was deposited with the plaintiffs' solicitors. The vendors called at the office of the plaintiffs' solicitors but produced no documents of title. On October 12, 1961, the plaintiffs took back their cheque but paid a similar sum to their solicitors to be paid out to the vendors when the ownership details were satisfactorily settled. On the same day the vendors' solicitors wrote to the plaintiffs' solicitors informing them that the vendors had purchased Lot 165 from the beneficial owners and requested the plaintiffs to pay 90% of the purchase price in advance. On October 21, 1961 the vendors applied to the Collector for variation of the express condition attached to the alienated portion of Lot 3. Upon the Collector refusing this on April 7, 1962 the vendors' solicitors wrote to the plaintiffs' solicitors conveying the information and concluded by requesting an advance payment. On May 8, 1962 the vendors' solicitors wrote to the plaintiffs' solicitors that the vendors considered the agreement to be at an end. The plaintiffs claimed specific performance of the contract.

Held: (1) clauses 4 and 5 of the option agreement were reciprocal promises intended to be simultaneously performed within the meaning of section 52 of the Contracts, (Malay States) Ordinance;

(2) non payment of the stipulated sum was entirely due to the default of the vendors being unable to perform their part of the contract;

(3) the plaintiffs were entitled to specific performance because they were ready and willing to complete at all times and the purported repudiation of the contract by the vendors on May 8, 1962 had not been accepted by them.

Cases referred to:—

(1) *Carter (Councils) Ltd.* v. *McGregor* [1962] 2 W.L.R. 17, 37.

(2) *Heyman* v. *Darwins Ltd.* [1942] A.C. 356, 361.

ACTION.

D. G. Rawson for the plaintiffs.

N. A. Marjoribanks for the defendants.

Cur. Adv. Vult.

Ong J.: In this action the plaintiffs are claiming specific performance of a contract for the sale of land.

By an agreement dated March 26, 1961 the vendors, Yong Fook Choon and Ho Hing Cheong, granted to the plaintiffs an option to purchase a parcel of land approximately 14,400 sq. ft. in area at the price of $39,000 provided that such option was exercised within six months. This area was comprised, in the main, of Lot No. 145 as the central portion, roughly rhomboidal, with two triangular pieces at the opposite ends which helped to convert the rhomboid into a neat rectangle. The triangle on the top left was then still part of State land designated as Lot No. 3, while the other triangle on the bottom right corner formed part of Lot No. 165 which did not belong to the vendors.

There is no dispute as to the extent and boundaries of the land forming the subject matter of the option agreement — indeed at all relevant times the parties had been fully agreed thereon — notwithstanding that the two triangular portions were not at the immediate disposal of the vendors by transfer. Alienation of portion of the State land for shop-house development had, however, already been approved in a letter by the Collector of Land Revenue to the vendors dated November 24, 1958 and there was no legal impediment to the inclusion thereof in the option agreement. As to the other triangular portion from Lot No. 165 the vendors had expectations — which in the event were fulfilled — of acquiring it from its proprietors, (see page 6 of Agreed Bundle "A").

The plaintiffs in due course exercised their option by notice in writing dated September 22, 1961 service of which was acknowledged by the vendors personally. It reads —

" 22nd September 1961.

Yong Fook Choon,
1 Klyne Street,
Kuala Lumpur.
Ho Hing Cheong,
218 High Street,
Kuala Lumpur.
Dear Sirs,

C.T. 13372 Lot 145 Section 98
Town of Kuala Lumpur E.M.R. 5169
Lot 165 Section 98 Town of Kuala
Lumpur Notice of exercise of Option.

We are pleased to attach a copy of the Federal Commissioner's letter of 21st September, 1961, giving us Planning Permission for our service station in line with plans submitted and signed by your goodselves as Landowners in April of last year. We thus would refer to

the Agreement dated the 26th March 1961 and pursuant to Clause 2 thereof now give you notice of our intention to purchase the option area referred to in Clause 1.

We should be obliged if you would arrange to call at the offices of our solicitors Messrs. Shearn Delamore & Co. and Drew & Napier at your earliest convenience bringing with you the documents of title in order that the transfer of an undivided one third share of the lands comprised in the said titles may be transferred into our name in accordance with the provisions of Clause 5 of the said agreement.

Our cheque for $33,500 will be delivered to you against the receipt of the documents of title and valid and registrable transfer of an undivided one-third share in our name.

Please acknowledge receipt.

Yours very truly,
CALTEX OIL (MALAYA) LTD.
Sgd. D. J. O'Sullivan
Station Manager
Kuala Lumpur."

As indicated in the above letter a cheque for $33,500 dated September 21, 1961, drawn by the plaintiffs in favour of the vendors (Ex. P8) had been left with the plaintiffs' solicitors for delivery to the vendors against receipt of documents of title and registrable transfers. The relevant clauses in the option agreement provided as follows:

"4. Upon the exercise of the Option as aforesaid the Purchaser shall pay to the Vendor the sum of Dollars Thirty-three thousand five hundred only ($35,000-00) by way of deposit and in part payment of the said purchase price.

5. Upon payment of the said sum upon exercise of the option the Vendor shall hand to the Purchaser a valid registrable transfer of an undivided one-third share of Selangor Certificate of Title No. 13372 for Lot No. 145 and Lot 165 (Part adjoining Lot 145) as shaded in red of the land held under E.M.R. 5169 Section 98 in the Town of Kuala Lumpur in the District of Kuala Lumpur together with the said document of titles in order that the Purchaser may be registered as the proprietor of an undivided one-third share and the Purchaser shall be entitled to enter forthwith into exclusive possession of the Option Area."

The second defendant, in his evidence, stated that he duly called on the plaintiffs' solicitors with his co-vendor, Yong Fook Choon, and there had a discussion with a representative of the plaintiffs, but in the result they went away without having received payment. He was, however, unable to assign any reason for the non-payment. It is at any rate quite clear from the evidence that when the vendors called at the office of Messrs. Shearn Delamore & Co. they brought no documents of title with them for execution of the proper transfers because (a) the title to their own Lot No. 145 was then in the possession of the Malayan Banking Limited as chargors upon a charge for $10,000, (b) they had no title yet to the portion of Lot No. 165 which they undertook to transfer under clause 5, (c) for the portion of State land comprised in Lot 3 no title had yet been issued to them.

The plaintiffs were thus not in default in any way for non-payment, and it is equally clear that the vendors themselves did not regard the plaintiffs to be in default because either then, or very shortly thereafter, they proceeded to hand over to the plaintiffs' Manager, as proof of their title to or interest in Lot No. 3, the original letter dated November 24, 1958 from the Collector of Land Revenue intimating approval of alienation against payment of premium fees, together with an official receipt for $2,020 paid for that purpose. (Ex. P6A, 6B).

On October 12, 1961 the plaintiffs took back for cancellation their cheque made out in favour of the vendors on September 21, 1961 and in its place they paid over a similar sum to their solicitors to be paid out by the latter "when the ownership details are satisfactorily settled". (See page 7 of Agreed Bundle "A"). On that same date the vendors' solicitors, Messrs. Lovelace & Hastings, wrote to the plaintiffs' solicitors as follows:

"LOVELACE & HASTINGS

12th October 1961

NAM/CYC/1110/61

Messrs. Shearn Delamore & Co.,
Advocate & Solicitors,
Kuala Lumpur.

Attention Mr. Rawson

Dear Sirs,

In re Caltex Ltd. & Ho Hing Cheong and Yong Fook Choon.

We write to advise you that we are acting for Messrs. Ho Hing Cheong and Yong Fook Choon in connection with the sale by them of land at Klang Road to your clients, Messrs. Caltex Ltd.

Our clients have entered into an agreement to purchase a small triangular piece of land contained in Lot 165 from Koo Chun (f) and Yee Kim Yeow as beneficial owners and we understand that a copy of the agreement is in your possession.

We have today presented for registration a memorandum of transfer of the land contained in Lot 165 in favour of Koo Chun and Yee Kim Yeow as purchasers and when registration has been completed they will, after subdivision, be in a position to execute a registrable memorandum of transfer of the triangular portion of the land contained in Lot 165 in favour of your clients.

Our clients inform us that they have agreed to sell your clients a portion of land adjacent to the triangular portion and they have instructed us to request that your clients now pay to them 90% of the agreed purchase price for the land adjacent and the triangular portion less any advances already made on the execution by our clients of an assignment of their rights over the triangular portion.

We shall be glad to hear from you as to this suggestion.

Yours faithfully,
Sd. Lovelace & Hastings."

The agreement of purchase referred to in paragraph 2 of the above letter has been produced by the plaintiffs (Ex. P9) and it bears the date October 4, 1961. From that letter itself, particularly paragraphs 1 and 4, I am of opinion

that it was at that stage accepted by both sides that the option had been duly exercised which bound the vendors to carry out their part of the contract, although they were as yet in no position fully to do so. The request made in paragraph 4 for an advance payment was merely an indulgence sought, to which the plaintiffs were not obliged to accede, and their refusal to pay constituted no breach on their part. The vendors consequently resigned themselves to wait for payment because on October 21, 1961 they wrote to the Collector of Land Revenue applying for variation of the express condition attached to the alienated portion of Lot No. 3 (see p. 8 of Agreed Bundle "A"), and next, on October 24, 1961 wrote by their solicitors to the plaintiffs' solicitors in these terms —

"LOVELACE & HASTINGS

24th October, 1961.

NAM/CAK/1110/61

Messrs. Shearn Delamore & Co.,
Advocates & Solicitors,
Kuala Lumpur.

Attention Mr. Rawson

Dear Sirs,

In re Caltex Ltd. and Ho Hing Cheong and Yong Fook Choon

Further to our letter of the 12th instant and with reference to our telephone conversation Mr. Marjoribanks /Mr. Rawson regarding an adjoining portion of State Land we enclose herewith a copy of a letter sent by Messrs. Yong Fook Choon & Ho Yew Nam (for whom we are also acting) to the Collector of Land Revenue.

In addition to the suggestion contained in our letter of the 12th instant we are instructed to suggest as follows:

(i) Messrs. Yong Fook Choon and Ho Yew Nam do execute an agreement to transfer the land contained in Lot 3 i.e. the State land when the title is issued to them.

(ii) Messrs. Ho Hing Cheong and Yong Fook Choon do execute a registrable memorandum of transfer of the land contained in Lot 145 of which they are the registered proprietors.

We shall be glad to hear from you as soon as possible in this connection.

Yours faithfully,

Sd. Lovelace & Hastings. "

In connection with the above letter I pause for a moment, on a point of clarification, to state that the vendors' solicitors, at the stage when they came into the picture, were not aware that "Ho Yew Nam" was no longer an interested party since he had already sold his half-share in the land to Ho Hing Cheong....and had assigned his interests in the agreement to Ho Hing Cheong (see Ex. P2). Nor, as has since been explained by defendants' counsel, were the vendors' solicitors aware, until several months after the event, that one of the vendors, Yong Fook Choon, died on November 30, 1961 and that letters of representation were not taken out by the first defendant until April 5, 1963.

To the above letter of October 24, 1961, the plaintiffs' solicitors were instructed to reply requesting "a draft of the proposed agreement between Yong Fook Choon and Ho Yew Nam and our clients with regard to Lot 3 and a draft of the proposed Assignment of Rights in respect of the agreement dated the 4th October 1961 on Lot 165" (see page 10 of "A"). On December 1, 1961 the vendors' solicitors replied that they were proceeding with the drafting of the agreements (see page 11 of "A"). No such draft, however, came to be supplied, and, of course, it is to be remembered that Yong Fook Choon had died on November 30, 1961.

The application for rescission of the express condition on alienation of Lot No. 3, however, hit a snag because on April 10, 1962 the vendors were informed by letter from the Collector of Land Revenue (see page 12 of "A") that the rescission was not approved and they were advised to surrender their approved application and submit a fresh application for consideration of the Ruler in Council. In this connection, however, it would seem that approval of the fresh application would merely be a formality required by red tape since planning permission for use of the site for a petrol filling and service station had been approved by the Commissioner for the Federal Capital on September 21, 1961. In any event the portion of Lot 3 was at the rear of the site, without any road frontage on the Klang Road, and was no more than an excrescence which was desirable but certainly not necessary. I accept the evidence of Mr. Dismore, the plaintiffs' manager, on this point and I am satisfied that the plaintiffs at no time regarded the inclusion of the 1611 square feet of Lot 3 as a *sine qua non* to their completion of the purchase of the rest of the land.

Upon receipt of the above letter from the Collector of Land Revenue the vendors' solicitors wrote on April 27, 1962 to the plaintiffs' solicitors conveying the information and advice received and concluded thus:

"All this is likely to take time and our clients have instructed us to inquire whether your clients would be prepared to advance a sum of money to them on their executing such documents as may be necessary to protect your clients' interests. (Underlining my own).

In the event of the scheme not receiving approval then the land to be returned to our clients on their refunding the amount of the advance."

Eleven days after exploring the prospects of advance payment of an indefinite sum the vendors' solicitors wrote on May 8, 1962 to the plaintiffs' solicitors as follows:

"Further to our letter of the 27th April, we are instructed to write that our clients now consider the agreements with your clients to be at an end as they have done everything they are required to do under the terms and conditions thereof and the final result is that the application has not been approved by the State Council.

However our clients would be prepared to enter into a fresh agreement provided a substantial sum is paid on the execution thereof."

There is no evidence that the plaintiffs accepted this repudiation of the contract by the vendors. On the contrary there is evidence, which I accept from Mr. Dinsmore, that the letter of May 8, 1962 was followed by correspondence marked "without prejudice" with reference to the land as well as meetings to discuss the same.

As to the requests for advance payment made on October 24, 1961 and again on April 27, 1962 all I need say is to quote Lord Hobson in the recent case of *White and Carter (Councils) Ltd.* v. *McGregor*: [1]

"There is no duty laid upon a party to a subsisting contract to vary it at the behest of the other party so as to deprive himself of the benefit given to him by the contract. To hold otherwise would be to introduce a novel equitable doctrine that a party was not to be held to his contract unless the court in a given instance thought it reasonable so to do."

The subsequent events are irrelevant except only that they throw considerable light on the vendors' motives — in repudiating their contract. On August 26, 1963 the plaintiffs were informed by letter from A. Arul & Co. (who I think were estate agents) advising that letters of administration had been extracted to the estate of Yong Fook Choon, and inquiring if they had any further interest in purchasing the property. On September 4, 1962 the plaintiffs' solicitors replied demanding completion by September 18. On September, 11 Arul & Co. wrote to say that the selling price was $70,000 on acceptance of which the vendors were prepared to execute the necessary transfers. On September 13 the plaintiffs' solicitors replied that their clients' option dated March 26, 1961 had already been duly exercised and that it had not been possible to complete by reason of the death of Yong Fook Choon. On October 14 the defendants granted a 14-day option to a broker for sale of six house-lots (the identical area which Yong Fook Choon and Ho Hing Cheong had contracted to sell to the plaintiffs) for $85,000. On October 23 the plaintiffs issued writ in this action. Finally, on November 4, 1963 the defendants' solicitors wrote to the plaintiffs' solicitors a letter which sets out the existing position as to the three lots namely, Lots 3, 145 and 165.

"(1) Lot 145. Our clients have given an option to purchase the front shop lots (including Lot 3 State Land) to a broker. A copy of the option is enclosed herewith. This option has been exercised and our clients have agreed with Messrs. Doraiswamy Aiyer & Kok Thoy who are acting for the purchasers to accept a deposit and complete within one month. No agreement for sale has been executed by our clients. It would appear that if your clients do not complete this matter they would be liable in damage and/or specific performance.

(2) Lot 165. The owner of this lot has sold the land to a third party notwithstanding the fact that he assigned the triangular portion to our clients.

Our clients believe that the persons who purchased Lot 165 have also purchased Lot 145 and it might therefore be to your clients' advantage to negotiate direct with these purchasers.

So far as our clients are concerned they only wish to receive $85,000.00 and they would be prepared to sell the portion of the land contained in Lot 165 including Lot 3 to your clients provided the option holders can be compensated by your clients."

In their defence the defendants admitted that the option had been exercised but pleaded (1) that upon exercise of the option the plaintiffs never paid or tendered the $35,000, payment of which sum was a condition precedent to the delivery of registrable transfers: (2) that from the plaintiffs' unwillingness to pay such sum and the non-approval by the Ruler-in-Council of the condition as to user of the land the defendants had "concluded that the plaintiffs were unwilling to proceed with the sale and purchase and accordingly on the 8th May 1962 terminated the agreement such termination being accepted by the plaintiffs; and (3) that in view of the plaintiffs' acquiescence as set out in the last-mentioned ground of defence and laches on their part in failing to commence this action until the lapse of 19 months since notice of termination of the agreement, the plaintiffs are debarred from seeking relief by way of specific performance.

As to the first ground, I have no hesitation in saying that in my opinion clauses 4 and 5 (set out in full at the beginning of this judgment) were reciprocal promises intended to be simultaneously performed within the meaning of section 52 of the Contracts (Malay States) Ordinance, 1950. For my own part I shall need unambiguous express terms before reading into any contract for the sale and purchase of land in Malaya a stipulation that payment is a condition precedent to execution of transfer, contrary to well established practice.

As regards the second ground I find as a fact (a) that the non-payment of the stipulated sum was entirely due to the default of the vendors being unable to perform their part of the contract, (b) that there was a sum of $35,000 ready and available at all times for payment to the vendors upon their production of the relevant documents of title, which they failed to do; (c) that there was no evidence of any facts which could reasonably have led the vendors to conclude that the plaintiffs were unwilling to complete and (d) that there is not an iota of evidence to show that the purported repudiation (or rescission) of the contract by the vendors on May 8, 1962 had ever been accepted by the plaintiffs as alleged.

On this last point, it is to be observed that the vendors were in error in stating in their letter of May 8, 1962 that they had done everything they were required to do under the terms

and conditions of the agreement, or that non-approval by the State Council of their application for amendment of the express condition on Lot No. 3 was the "final result". They are contradicted by the very words in their own letter of April 27, 1962.

As to the effect of the vendors' repudiation of their contract it has been said that such repudiation is "writ in water" unless accepted by the other party. In *White and Carter (Councils) Ltd* v. *McGregor*, referred to earlier, Lord Morton of Henryton said: (at p. 25)

"It is well established that repudiation by one party does not put an end to a contract. The other party can say 'I hold you to your contract, which still remains in force.' What then is his remedy if the repudiating party persists in his repudiation and refuses to carry out his part of the contract? The contract has been broken. The innocent party is entitled to be compensated for damages for any loss which he has suffered by reason of the breach and in a limited class of cases the court will decree specific implement."

See also *Heyman* v. *Darwins Ltd.*[2]

Finally, as to laches and acquiescence, there is the clearest evidence — from the correspondence, the conduct of the parties, and the death of Yong Fook Choon on November 30, 1961 making it impossible for any valid and registrable transfer to be executed until constitution of a proper legal representative 16 months and 5 days later — which disposes of the defence of laches and acquiescence.

For the above reason the defence fails on all grounds. Since the plaintiffs are ready, willing and anxious to obtain specific performance relating only to Lot No. 145 I am of opinion that, in accordance with the principles laid down in sections 13 and 15 of the Specific Relief (Malay States) Ordinance, 1950, they should be entitled to the relief claimed in prayer 2 of their statement of claim. From the total area of 14,400 square feet 1611 square feet and 1250 square feet respectively fall to be deducted in respect of Lot Nos. 3 and 165 leaving 11,539 square feet within Lot No. 145. The abatement in the purchase price at $2.70 per square foot amounts to $7,724.70. I accordingly order that the defendants do specifically perform the said contract in so far as it relates to Lot No. 145 by executing a proper registrable transfer of 11,539 square feet thereof, being the portion marked and delineated in the plan attached to the agreement of March 26, 1961, against payment of the full balance of the agreed purchase price less the sum of $7,724.70. No damages have been asked for, and I make no order in this respect. Costs of this action to the plaintiffs. Liberty to apply.

Order accordingly.

Solicitors: *Shearn, Delamore & Co.*; *Lovelace & Hastings.*

PUBLIC PROSECUTOR v. SHEPHERD

[A.Cr.J. (Hepworth J.) January 7, 1964]
[Penang — Criminal Appeal No. 25 of 1963]

Road Traffic Ordinance, 1958—Charge under s. 36(1) —Notice of intended prosecution—Notice incomplete— Date time and place of accident not specified in notice as required by s. 56(b)—Whether notice a valid notice.

Four hours after an accident a notice of intended prosecution was served on an accused. In the notice so served neither the date nor time of the accident was stated.

Held: there had been a complete failure to comply with the provisions of the Ordinance which required that date, time and place of accident should be specified and the case could not be treated on par with those where date, time and place were specified but were inaccurate. The notice was not therefore a notice within the meaning of section 56(b) of the Road Traffic Ordinance, 1958.

Cases referred to:—

(1) *Public Prosecutor* v. *Teh Khian Long* [1961] M.L.J. 47.

(2) *Pope* v. *Clarke* [1953] 2 All E.R. 704.

(3) *Young* v. *Day* (1959) 123 J.P. 317; 109 L.J. 519.

CRIMINAL APPEAL.

Wan Ismail bin Wan Mohd. Salleh (Deputy Public Prosecutor) for the appellant.

Chin Yew Choe for the respondent.

Hepworth J.: The respondent had been acquitted of the offence of driving a motor vehicle without due care and attention under section 36(1) of the Road Traffic Ordinance, 1958. From this order of acquittal the Public Prosecutor appealed.

The reason why the learned Magistrate acquitted the respondent was that on the face of the notice of intended prosecution (Exhibit P.5) it was incomplete, firstly because the nature of the offence for which the defendant was to be prosecuted was insufficiently particularised and was not clear and secondly because the provisions of section 56(b) of the Ordinance had not been otherwise complied with in that the police had failed to specify the date, time and place of the accident in the notice.

In my opinion the offence was sufficiently particularised and the question which remained to be answered was whether or not by failing to specify the date, time and place of the accident on the notice of intended prosecution the notice was invalid.

In support of his appeal the learned Deputy argued that as the notice had been served on the respondent only four hours after the accident, out of which the charge arose, had happened, the respondent must have been perfectly clear in his mind what the notice was referring to and that accordingly the purpose of the section had been achieved. He quoted in support of his contention the judgment of Thomson C.J. (as he then was) in *Public Prosecutor* v. *Teh Khian Long.*[1] In that case, the case of *Pope* v. *Clarke* [2] was